

NO. PD-0538-17

IN THE TEXAS COURT OF CRIMINAL APPEALS

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EDDIE OFFIONG ETTE V. THE STATE OF TEXAS

On Discretionary Review of Appeal No. 02-16-00173-CR
in the Second Court of Appeals of Texas at Fort Worth

APPELLANT'S BRIEF

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IDENTITY OF PARTIES AND COUNSEL

Pursuant to Rule 38.1(a) of the Texas Rules of Appellate Procedure, the following is a list of all trial judges, parties to the trial court's judgment, and respective trial and appellate counsel:

Trial Court Judge

Hon. David Hagerman, presiding judge
297th Criminal District Court
Tarrant County, TX

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TABLE OF CONTENTS

page

IDENTITY OF PARTIES AND COUNSEL.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	v
STATEMENT OF THE CASE	1
STATEMENT REGARDING ORAL ARGUMENT.....	2
QUESTION PRESENTED FOR REVIEW.....	2
STATEMENT OF FACTS.....	2
SUMMARY OF THE ARGUMENT.....	4
ARGUMENT AND AUTHORITIES.....	4
QUESTION PRESENTED FOR REVIEW ONE (RESTATED)	
The court of appeals erred in affirming a fine included in the judgment which had not been orally pronounced by the trial court at sentencing.....	4
A. <i>Facts</i>	4
B. <i>Opinion Below</i>	4
C. <i>Controlling Law</i>	8
D. <i>The Aguilar “Abiguity” Exception</i>	10
E. <i>Due Process Requires a Reversal</i>	13
PRAYER.....	16
CERTIFICATE OF COMPLIANCE.....	17

CERTIFICATE OF SERVICE.....	17
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TABLE OF AUTHORITIES

<i>Cases</i>	<i>page</i>
<i>Aguilar v. State</i> , 202 S.W.3d 840 (Tex. App.-Waco 2006, pet. ref'd).....	6, 10, 11, 13
<i>Armstrong v. State</i> , 340 S.W.3d 759 (Tex. Crim. App. 2011).....	6, 9
<i>Bigley v. State</i> , 865 S.W.2d 26 (Tex. Crim. App. 1993).....	10
<i>Cazares v. State</i> , No. 05-15-00231-CR, 2016 WL 3144274 (Tex. App.— Dallas June 6, 2016, no pet.) (mem. op., not designated for publication).....	5, 6
<i>Coffey v. State</i> , 979 S.W.2d 326 (Tex. Crim. App. 1998).....	11, 12
<i>State v. Crook</i> , 248 S.W.3d 172 (Tex. Crim. App. 2008).....	9
<i>Ette v. State</i> , ___ S.W.3d ___, 2017 WL2178875 (Tex. App.— Fort Worth, May 18, 2017, no. pet. h.).....	3, 4, 5, 7
<i>Hawkins v. State</i> , No. 02-15-00338-CR, 2016 WL 4474351 (Tex. App.— Fort Worth Aug. 25, 2016, pet. ref'd) (mem. op., not designated for publication).....	5, 6
<i>Hernandez v. State</i> , No. 02-12-00392-CR, 2014 WL 1510093 (Tex. App.— Fort Worth Apr. 17, 2014, no pet.) (mem. op., not designated for publication).....	5, 6

Hicks v. State,

Nos. 12-00-00301-CR, 12-00-00302-CR, 2002 WL 1065985
(Tex. App.-Tyler, May 22, 2002, no pet.)
(mem. op., not designated for publication).....15-16

Jackson v. State,

No. 05-13-00004-CR, 2014 WL 2611106 (Tex. App.—
Dallas June 11, 2014, no pet.)
(mem. op., not designated for publication).....5, 6

Kimble v. State,

No. 02-15-00370-CR, 2016 WL 2840922 (Tex. App.—
Fort Worth May 12, 2016, pet. ref'd)
(mem. op., not designated for publication).....5, 6

Ex parte Madding,

70 S.W.3d 131 (Tex. Crim. App. 2002).....7, 8, 9, 10, 13, 14, 15, 16

Neal v. State,

No. 08-07-00232-CR, 2010 WL 160206 (Tex. App.—
El Paso, Jan. 13, 2010, pet. ref'd)
(mem. op., not designated for publication).....6

Sauceda v. State,

No. 03-07-00268-CR, 2007 WL 4354455 (Tex. App.-
Austin, Dec.12, 2007, no pet.)
(mem. op., not designated for publication).....15

Sequiera v. State,

No. 04-14-00361-CR, 2015 WL 4554334 (Tex. App.-
San Antonio, July 29, 2015, no pet.)
(mem. op., not designated for publication).....15

Simmons v. State,

No. 05-15-00162-CR, 2016 WL 3144254 (Tex. App.—
Dallas June 6, 2016, no pet.)
(mem. op., not designated for publication).....5, 6

<i>Taylor v. State</i> , 131 S.W.3d 497 (Tex. Crim. App. 2004)	7, 9, 10, 12, 13
<i>Thompson v. State</i> , 108 S.W.3d 287 (Tex. Crim. App. 2003)	12
<i>Weir v. State</i> , 278 S.W.3d 364 (Tex. Crim. App. 2009)	9
<i>Wiedenfeld v. State</i> , 450 S.W.3d 905 (Tex. App.–San Antonio 2014, no pet.)	14, 15
 Statutes	
TEX. PENAL CODE ANN. § 32.45(b), (c)(7) (West Supp. 2005) (amended by Acts 2015, 84th Leg., ch. 1251 (H.B. 1396), § 21, eff. Sept. 1, 2015)	2
TEX. CODE CRIM. PRO. ANN. ART. 42.01, § 1	8
TEX. CODE CRIM. PRO. ARTS. 42.02	9
TEX. CODE CRIM. PRO. ART. 42.07	9
TEX. CODE CRIM. PRO. ARTS. 42.09 § 1	9

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in the Second Court of Appeals of Texas at Fort Worth

APPELLANT’S BRIEF ON THE MERITS

TO THE HONORABLE TEXAS COURT OF CRIMINAL APPEALS:

Comes now Appellant, Eddie Offiong Ette, by and through his attorney of record, and respectfully presents to this Court his Brief on the Merits in the named Cause, pursuant to the Rules of the Court.

STATEMENT OF THE CASE

Eddie Offiong Ette (“Mr. Ette” or “Appellant”) was indicted the felony offense of misapplication of fiduciary property in an amount exceeding \$200,000. [C.R. 6]. On March 21, 22, 23, 24 , 29 and 30, 2016, a jury trial was held in the 297th Criminal District Court of Tarrant County. [II, III IV, V, VI & VII R.R. *passim*]. The jury found Mr. Ette guilty as charged in the indictment. [VII R.R. 7]. Punishment was to the

jury, which assessed a sentence of ten (10) years incarceration, with a \$10,000 fine, but recommended that Mr. Ette be placed on probation. [VII R.R. 68]. A timely Notice of Appeal was filed on April 28, 2016. [C.R. 1460].

STATEMENT REGARDING ORAL ARGUMENT

The Court's Order granting Mr. Ette's Petition for Discretionary Review stated that oral argument would not be permitted.

QUESTION PRESENTED FOR REVIEW

The court of appeals erred in affirming a fine included in the judgment which had not been orally pronounced by the trial court at sentencing.

STATEMENT OF FACTS

Appellant was indicted for and went to trial on the felony offense of misapplication of fiduciary property in an amount exceeding \$200,000, alleged to have occurred on or about December 10, 2007. [C.R. 6]. See [TEX. PENAL CODE ANN. § 32.45\(b\), \(c\)\(7\)](#)¹ (West Supp. 2005) (amended by [Acts 2015, 84th Leg., ch. 1251 \(H.B. 1396\), § 21, eff. Sept. 1, 2015](#)).² The jury convicted Petitioner and issued a verdict of a ten-

¹

Unless stated otherwise, all citations to statutory authority are to the current versions.

²

As noted by Mr. Ette on appeal, the judgment in this case contained a

year probated sentence and a \$10,000 fine which was not probated. [VII R.R. 7, 68]. The trial court sentenced Petitioner accordingly, with the exception that the fine was not pronounced orally at sentencing. [VII R.R. 69].

SUMMARY OF THE ARGUMENT

The court of appeals erred when it disregarded binding precedent from this Court by affirmed the validity of the fine which was not pronounced by the trial court at sentencing. As due process and precedential authority from this Court require that the fine be orally pronounced by the trial court in the presence of the defendant, this Court should modify the judgment entered below by deleting the fine included in the written judgment.

typographical error, wherein it states that the statute of conviction was 32.43(c)(7) of the penal code, rather than the correct 32.45(c)(7). The court of appeals amended the trial court judgment to show the correct statute of conviction. See *Ette v. State*, __ S.W.3d __, 2017 WL2178875, *7 (Tex. App.-Fort Worth, May 18, 2017, no. pet. h.).

ARGUMENT AND AUTHORITIES

QUESTION PRESENTED FOR REVIEW (RESTATED)

The court of appeals erred in affirming a fine included in the judgment which had not been orally pronounced by the trial court at sentencing.

A. *Facts*

Appellant was indicted for and went to trial on the felony offense of misapplication of fiduciary property in an amount exceeding \$200,000, alleged to have occurred on or about December 10, 2007. [C.R. 6]. The jury convicted Appellant and assessed a ten-year probated sentence and a \$10,000 fine which was not probated. [VII R.R. 7, 68]. The trial court sentenced Appellant accordingly, with the exception that the fine was not pronounced orally at sentencing. [VII R.R. 69].

B. *Opinion Below*

Pertinent to the complaint raised in this Petition, the court of appeals correctly recognized that the trial court did not orally assess the fine when pronouncing the sentence. *Ette*, __ S.W.3d __, 2017 WL2178875 at *6. However, the court qualified that omission with the word “inadvertent” as part of its construct utilized to utterly disregard binding authority of this court. *Id.* The court of appeal then proceeded to opine that the trial court’s failure to articulate any fine at sentencing

was somehow “ambiguous,” and thereby permit the court to “harmonize” the jury’s verdict, trial court’s pronouncement, and trial court judgment to determine that the failure to assess the fine at sentencing was close enough for government work. *Id.* In support of this holding, the Second Court of Appeals cited to a string of unpublished cases; none of which are from this Court. *See id.* (citing *Hawkins v. State*, No. 02-15-00338-CR, 2016 WL 4474351, at *7-8 (Tex. App.—Fort Worth Aug. 25, 2016, pet. ref'd) (mem. op., not designated for publication); *Kimble v. State*, No. 02-15-00370-CR, 2016 WL 2840922, at *2 (Tex. App.—Fort Worth May 12, 2016, pet. ref'd) (mem. op., not designated for publication); *Hernandez v. State*, No. 02-12-00392-CR, 2014 WL 1510093, at *2-3 (Tex. App.—Fort Worth Apr. 17, 2014, no pet.) (mem. op., not designated for publication); *accord Cazares v. State*, No. 05-15-00231-CR, 2016 WL 3144274, at *1-2 (Tex. App.—Dallas June 6, 2016, no pet.) (mem. op., not designated for publication); *Simmons v. State*, No. 05-15-00162-CR, 2016 WL 3144254, at *2 (Tex. App.—Dallas June 6, 2016, no pet.) (mem. op., not designated for publication); *Jackson v. State*, No. 05-13-00004-CR, 2014 WL 2611106, at *7-9 (Tex. App.—Dallas June 11, 2014, no pet.) (mem. op., not designated for

publication); *Neal v. State*, No. 08-07-00232-CR, 2010 WL 160206, at *9–10 (Tex. App.—El Paso, Jan. 13, 2010, pet. ref'd) (mem. op., not designated for publication)).

What all of the State's unpublished cases have in common is their reliance on some "ambiguous sentence pronouncement rule" originally promulgated by the Waco Court of Appeals in *Aguilar v. State*, 202 S.W.3d 840, 843 (Tex. App.—Waco 2006, pet. ref'd).³ In addressing situations where the trial court's sentencing pronouncement is "ambiguous," the *Aguilar* court created a new paradigm in Texas sentencing law, and held "that the jury's punishment verdict, the court's pronouncement, and the written judgment should be read together in an effort to resolve the ambiguity." *Id.* at 843. Problematically, the *Aguilar* court did not fortify this holding with any citation to authority which would support such a bald assertion. *Id.*

For reasons which will become evident, the majority opinion below never cited, acknowledged, or alluded to this Court's controlling opinions in *Armstrong v. State*, 340 S.W.3d 759 (Tex. Crim. App. 2011);

3

See *Hawkins*, 2016 WL 4474351 at *8; *Kimble*, 2016 WL 2840922 at *1 n.5; *Hernandez*, 2014 WL 1510093 at *2; *Cazares*, 2016 WL 3144274 at *1; *Simmons*, 2016 WL 3144254 at *2; *Jackson*, 2014 WL 2611106 at *8; *Neal*, 2010 WL 160206 at *9.

Taylor v. State, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004) or *Ex parte Madding*, 70 S.W.3d 131, 135 (Tex. Crim. App. 2002).

However, the dissenting opinion of Justice Kerr did cite to *Armstrong*, *Taylor*, and *Madding* in arguing that the trial court's failure to assess a fine here was not "ambiguous" and that this Court's binding authority directed that the fine therefore be stricken from the judgment. *Ette*, __ S.W.3d __, 2017 WL2178875 at *8-*11 (Kerr, J., dissenting). The dissent was correct in holding that the trial court's sentencing pronouncement was not "ambiguous," but rather plainly was in conflict with the judgment, a reality which negated the application of the ambiguous sentence pronouncement rule manufactured by *Aguilar*. Specifically, the dissent argued,

[w]hen the sentence omits a fine, there is neither a fine nor an ambiguity within the sentencing process about the fine's presence or absence. When, though, as in *Aguilar*, *Hernandez*, and *Hawkins*, something about the sentencing process itself suggests an ambiguity for varying reasons, I agree that courts may look outside the pronouncement of sentence for resolution – but it is improper to do so in order to create ambiguity in the first place. *Aguilar* itself, upon which all the other cases rely, did not go that far.

Id. at *11 (Kerr, J., dissenting). However, the dissent did not go far enough. The dissent gamely pointed out the distinction between the

case at bar from the false construct created whole cloth by *Aguilar*, rather than arguing that the entire “ambiguous sentence pronouncement rule” is not a legitimate component of Texas statutory or case law, and fails to comport with the fundamental right to due process possessed by criminal defendants.⁴

C. *Controlling Law*

“A trial court’s pronouncement of sentence is oral, while the judgment, including the sentence assessed, is merely the written declaration and embodiment of that oral pronouncement.” *Madding*, 70 S.W.3d at 135 (citing [TEX. CODE CRIM. PRO. ANN. ART. 42.01, § 1](#)). Thus, when the trial court’s oral pronouncement conflicts with the written judgment, the oral pronouncement controls. *Id.* As this Court stated in *Madding* :

To orally pronounce one sentence to a defendant’s face and then to sign a written judgment ... when the defendant is not present, that embodies ... [a] more severe sentence than the oral sentence, violates any notion of constitutional due process and fair notice. A defendant has a due process ‘legitimate expectation’ that the sentence he heard orally pronounced in the courtroom is the same sentence he will be required to serve.”

⁴

See Section “E” below.

Id. at 136.

Fines are punitive and are intended to be part of the convicted defendant's sentence as they are imposed pursuant to Chapter 12 of the Penal Code, which is entitled "Punishments." *Armstrong*, 340 S.W.3d at 767 (citing *Weir v. State*, 278 S.W.3d 364, 366 (Tex. Crim. App. 2009)); *State v. Crook*, 248 S.W.3d 172, 174 (Tex. Crim. App. 2008) (holding fine is part of sentence). Fines must be orally pronounced in the defendant's presence. *Armstrong*, 340 S.W.3d at 767. *Taylor*, 131 S.W.3d at 500. Finally, Texas law directs that a defendant's sentence is "pronounced ... by the court [and] is that part of the judgment ... that orders that the punishment be carried into execution in the manner prescribed by law."⁵ [TEX. CODE CRIM. PRO. ARTS. 42.09 § 1, 42.02.](#)

The written judgment here includes a \$10,000 fine. [C.R. 135]. The trial court failed to assess any fine when orally pronouncing Mr. Ette's sentence. [VII R.R. 69]. As is the case here, where there is a conflict between the orally-pronounced sentence and the written

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Therefore, the mere reading of the jury verdict form does not comport with the Texas statutory law controlling the assessment of a criminal sentence. *See* [TEX. CODE CRIM. PRO. ARTS. 42.09 § 1, 42.02](#); *see also* [TEX. CODE CRIM. PRO. ART. 42.07](#) ("Before pronouncing sentence, the defendant shall be asked whether he has anything to say why the sentence should not be pronounced against him.").

judgment, the sentence pronounced orally controls. *Taylor*, 131 S.W.3d at 502 (citing *Madding*, 70 S.W.3d at 135). Therefore, the written judgment was required by law to be modified to conform with the sentence pronounced orally. *Taylor*, 131 S.W.3d at 502; *see also* TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993). The court of appeals erred in failing to hold so.

D. *The Aguilar “Abiguity” Exception*

In its brief below, the State cited to *Aguilar v. State*, 202 S.W.3d 840 (Tex. App.-Waco 2006, pet. ref’d), as purported support for its argument that the sentence orally pronounced was “ambiguous.” [St. Br. at 19]. However, the facts in *Aguilar* strikingly differ from the facts here. In *Aguilar*, the Appellant had been convicted of six sexual offenses against his stepdaughter. *Id.* at 840-41. The trial court cumulated the sentences as authorized by law, and orally pronounced:

Aurelio Hernandez Aguilar, the jury having found you guilty, the Court finds you guilty and assesses your punishment therefor at confinement in the Institutional Division of the Texas Department of Criminal Justice on Count 1 for a term of 45 years. Count 2, you are sentenced to a period of 10 years in the Institutional Division of the Texas Department of Corrections [sic]. Count 3, it’s the sentence of the Court that you be confined in the Institutional Division of the Texas Department of Criminal Justice for a period of 10 years. It is also the sentence of the

Court, the jury having found you guilty and assessed your punishment, sentences you to confinement in the Institutional Division of the Texas Department of Criminal Justice for a period of 10 years. Count 5, the jury having found you guilty and assess your punishment in the Institutional Division of the Texas Department of Criminal Justice for a period of 10 years, sentences you to a period of 10 years. Count 6, the jury having found you guilty and assessed your punishment on Count 6 at confinement in the Institutional Division of the Texas Department of Criminal Justice for a term of 15 years, the Court sentences you to a term of 15 years.

Id. at 843. On appeal, Aguilar complained that the stacking order as to Count 4 was invalid, as the trial court had omitted an explicit reference to Count 4 in the oral pronouncement. *Id.* The Waco Court of Appeals held that since the trial court had orally pronounced a sentence of 10 years on Count 4 but merely failed to articulate the words “Count 4” in the soliloquy, the trial court’s oral pronouncement corresponded to the jury’s punishment verdict, and the failure to actually articulate “Count 4” was nothing more than a mere variance. *Id.* However, the *Aguilar* Court did reiterate that where there’s an actual conflict between the oral pronouncement of sentence and the written judgment, the oral pronouncement will control. *Id.*

The *Aguilar* Court cited to *Coffey v. State*, 979 S.W.2d 326, 328 (Tex. Crim. App. 1998), for authority on its variance ruling. This Court

held in *Coffey* that “when there is a variation between the oral pronouncement of sentence and the written memorialization of the sentence, the oral pronouncement controls.” *Coffey*, 979 S.W.2d at 328; accord *Taylor*, 131 S.W.3d at 500. Application of this rule can be seen in *Thompson v. State*, where, though the defendant was convicted of two counts, the trial court pronounced sentence on only one count but signed a written judgment imposing identical sentences for both counts. 108 S.W.3d 287, 289 (Tex. Crim. App. 2003). This Court affirmed the lower court’s decision to dismiss the appeal as to the count for which no sentence had been pronounced, on the grounds that there was no conviction to appeal.⁶ *Id.* at 288–89.

In short, *Aguilar* does not support the State’s bold assertion that a direct conflict is somehow now “ambiguous.” The opinion is free-standing and is irrelevant in the circumstance here—a direct conflict between the written judgment entered by the trial court and the oral

6

Of particular relevance here, the *Thompson* Court accurately noted that “... the conflict in this case is between ‘no sentence’ and a ‘thirty years’ sentence” in dismissing the appeal in which no underlying sentence had been pronounced. *Thompson*, 108 S.W.3d at 290. Reflected here, the difference is between “no fine” and a “\$10,000 fine” which was not pronounced. [VII R.R. 69]. *Thompson* thus further demonstrates the correct ruling the court of appeals should have made here. *Thompson*, 108 S.W.3d at 290.

pronouncement of sentence articulated by the trial court. *Aguilar* fails to cite to any authorizing the imposition of a fine where it was not pronounced orally; as in truth it can't, since Texas law is clear that a fine may not be imposed in a written judgment of conviction which was not orally pronounced by the trial court at sentencing.⁷ *Taylor*, 131 S.W.3d at 502; *Madding*, 70 S.W.3d at 135. *Aguilar* stands for nothing more than where the trial court orally pronounces a multiple-count stacked sentence in a long string of stacked sentences, the stacking order is still valid even where one of the counts is not specifically mentioned. *Aguilar*, 202 S.W.3d at 843. *Aguilar* therefore does not support the opinion of the court of appeals.

E. *Due Process Requires a Reversal*

Fifteen years ago this Court addressed a nearly identical situation and forcefully outlined the bedrock principles at issue, holding that

[t]o orally pronounce one sentence to a defendant's face and then to sign a written judgment more than a month later, when the defendant is not present, that embodies an extravagantly different and more severe sentence than the

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It is glaring that no published case prior to the instant case below has cited to *Aguilar* for the premise that a fine may be imposed in a written judgment even where it was not pronounced by the trial court at sentencing.

oral sentence, violates any notion of constitutional due process and fair notice. A defendant has a due process “legitimate expectation” that the sentence he heard orally pronounced in the courtroom is the same sentence that he will be required to serve.

Madding, 70 S.W.3d 136 (citations omitted).

The San Antonio Court of Appeals has followed the teachings of *Madding* under circumstances similar to the case at bar. See *Wiedenfeld v. State*, 450 S.W.3d 905, 907 (Tex. App.–San Antonio 2014, no pet.).

There, the record establishes that after the jury verdict was read, the trial court orally pronounced sentence, stating:

Then I will hereby approve the verdict of the jury and sentence you, Mr. Wiedenfeld to 11 years in the penitentiary on both counts. They will run concurrent. **I assess a \$1,000 fine, which will also run concurrent.**

Id. at 906 (emphasis in original). Despite the oral pronouncement, the trial court’s original judgment and subsequent *nunc pro tunc* judgment assessed a fine of \$2,000.00. The trial court prepared a withdrawal notification to the Texas Department of Criminal Justice–Institutional Division based on the assessment of a \$2,000.00 fine. The assessment of punishment was contrary to the court’s oral pronouncement. Relying heavily on *Madding*, the court of appeals modified the judgments to conform with the oral pronouncement of sentences, stating,

if there is a variance between the trial court's oral pronouncement and the written judgment, the oral pronouncement controls. Accordingly, we hold the trial court erred in assessing \$2,000.00 in fines in the written judgment. We hold the *nunc pro tunc* judgment must be modified to reflect the imposition of a \$1,000.00 fine. Moreover, the trial court must also amend its withdrawal notification directing the Texas Department of Criminal Justice—Institutional Division to reflect withdrawals commensurate with the modified judgment.

Id. at 907 (citing *Madding*, 70 S.W.3d at 135); *see also Sequiera v. State*, No. 04-14-00361-CR, 2015 WL 4554334, at *5-*6 (Tex. App.-San Antonio, July 29, 2015, no pet.)(mem. op., not designated for publication) (modifying judgment by deleting fine, family violence finding and reducing sentence to comport judgment with oral pronouncement of sentence) (citing *Madding*, 70 S.W.3d at 135).

Other courts of appeals have had little difficulty in following this Court's due process guidance provided by *Madding*. *See e.g., Saucedo v. State*, No. 03-07-00268-CR, 2007 WL 4354455, at *1-*2 (Tex. App.-Austin, Dec.12, 2007, no pet.) (mem. op., not designated for publication) (noting violation of due process to impose harsher sentence in written judgment than sentence orally pronounced and deleting unpronounced restitution order) (citing *Madding*, 70 S.W. at 136-37); *Hicks v. State*, Nos. 12-00-00301-CR, 12-00-00302-CR, 2002 WL 1065985, at *2 (Tex.

App.-Tyler, May 22, 2002, no pet.)(mem. op., not designated for publication) (reforming written sentence to conform with oral pronouncement and noting the violation of due process to impose a harsher written sentence than the one orally pronounced) (citing *Madding*, 70 S.W. at 136). The court of appeals below should have as well.

This Court now has the opportunity to reaffirm the commitment to due process enunciated in *Madding* by holding that there is no “ambiguity exception” to due process in the State of Texas. See *Madding*, 70 S.W. at 136-37.

PRAYER

For the foregoing reasons, Appellant respectfully requests that this Court sustain the question presented for review and modify the written judgment entered below by deleting the fine included in that judgment. Appellant respectfully requests that he be granted any such further relief to which he may show himself justly entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the word count for the portion of this filing covered by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure is 2,866.

/s/ Daniel Collins
Daniel Collins

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been furnished to counsel for the Appellees listed below pursuant to Rule 9.5(b)(1) of the Texas Rules of Appellate Procedure through the electronic filing manager, as opposing counsel's email address is on file with the electronic filing manager, on September 27, 2017.

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